CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A–02–338 OF 2000

LAMIN PCA, MOKHTAR SIDIN AND MOHD SAARI JJCA

8 DECEMBER 2000

Civil Procedure *— Appeal — Notice of — Appeal to Court of Appeal — Striking out — — Whether leave required from winding up cour — Whether appeal properly brought — — Companies Act 1965 s 226(3), Courts of Judicature Act 1964 s 67*

The respondent filed an application to strike out the notice of appeal filed by the appellant in respect of a decision by the judge of the Ipoh High Court. The ground to strike out the notice of appeal was that the appellant, knowing that the respondent had been wound up, did not seek leave from the winding up court and thus had failed to comply with the mandatory provisions of s 226(3) of the Companies Act 1965 ('the Act') read together with s 67 of the Courts of Judicature Act 1964 ('CJA'). The appellant took the view that there was no necessity to do so because it was an appeal against the decision of the judge of the High Court. As such it was a continuation of an earlier proceeding where the appellant was defending itself.

Held, allowing the application:

All civil appeals could be proceeded upon subject to any restrictions imposed by the CJA or any written law. The CJA defines an appeal as a 'proceeding' within the meaning of s 67 of the CJA. That being the case any appeal to be proceeded upon is subject to the restrictions imposed. One of them is the restriction imposed by s 226(3) of the Act whereby a party must obtain leave from the winding up court to proceed with an appeal against a company which has been wound up which include the commencement of the appeal, i.e. the filing of the notice of appeal. Since the appellant had failed to comply with the requirement of s 226(3) of the Act, the notice of appeal was struck off (see pp 513A, 516E, G–H).

[Bahasa Malaysia summary

Responden telah memfailkan satu permohonan untuk membatalkan notis rayuan yang difailkan oleh perayu berhubung dengan satu keputusan oleh hakim Mahkamah Tinggi Ipoh. Alasan untuk membatalkan notis rayuan tersebut adalah bahawa perayu, setelah mengetahui bahawa responden telah digulungkan, tidak memohon kebenaran daripada mahkamah penggulungan dan oleh itu telah gagal untuk memenuhi peruntukan-peruntukan mandatori s 226(3) Akta Syarikat 1965 ('Akta tersebut') yang dibaca bersama s 67 Akta Mahkamah Kehakiman 1964 ('AMK'). Perayu mengambil

pandangan bahawa tiada keperluan untuk berbuat sedemikian kerana ia adalah satu rayuan terhadap keputusan hakim Mahkamah Tinggi. Justeru itu ia adalah satu sambungan kepada prosiding terdahulu di mana perayu telah membuat pembelaan.

Diputuskan, membenarkan permohonan tersebut:

Semua rayuan sivil boleh dimulakan tertakluk kepada apa-apa sekatan yang dikenakan oleh AMK atau apa-apa undang-undang bertulis. AMK menakrifkan satu rayuan sebagai satu 'prosiding' dalam maksud s 67 AMK. Demikian kesnya apa-apa rayuan yang akan dimulakan adalah tertakluk kepada sekatan-sekatan yang dikenakan. Salah satu daripadanya adalah sekatan yang dikenakan oleh s 226(3) Akta tersebut di mana satu pihak mestilah mendapatkan kebenaran daripada mahkamah penggulungan untuk memulakan satu rayuan terhadap satu syarikat yang telah digulungkan, iaitu pemfailan notis rayuan. Memandangkan perayu telah gagal untuk memenuhi keperluan s 226(3) Akta tersebut, notis rayuan tersebut telah dibatalkan (lihat ms 513A, 516E, G–H).]

Notes

For cases on notice of appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 788–841.

Cases referred to

Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549 (refd)
Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 MLJ 204 (refd)
Perdana Merchant Bankers Bhd, Re [1997] 3 MLJ 435 (refd)
Rawat Raj Kumar Singh & Ors v Benares Bank Ltd, Benares (in liquidation) & Ors (1941) AIR All 154 (refd)

Legislation referred to

Companies Act 1965 s 226(3)
Courts of Judicature Act 1964 ss 3, 67(1)

Appeal from: Civil Suit No 22–211 of 1990 (High Court, Ipoh)

Porres P Royan (*T Sudharsanan* with him) (*Shook Lin & Bok*) for the appellant.

Karpal Singh (*CK Leong and M Mathialagan* with him) (*CK Leong & Co*) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court)**.** : This is an application by the respondent by way of notice of motion dated 13 September 2000, to strike out the notice of appeal dated 19 May 2000 filed by the appellant. The notice of appeal was in respect of a decision by the learned judge of the High Court, Ipoh in Civil Suit No 22–211–1990 ('the

Ipoh civil suit'). It is to be noted that the record of appeal had been filed in this court and was also fixed for hearing. The ground to strike out the notice of appeal was that the appellant failed to abide by the mandatory provisions of s 226(3) of the Companies Act 1965 ('the Act') read together with s 67 of the Courts of Judicature Act 1964 ('CJA').

We have allowed this application earlier and we now give our reasons for doing so.

Before proceeding, we think it is necessary to give a brief summary of the appeal leading to this application. The respondent who was the plaintiff in the court below filed a writ of summons and statement of claim against the appellant claiming the amount insured for the respondent's building and the goods contained therein which were burnt down. The building and the goods were insured with the appellant and another insurance company. The appellant was sued for its share of the sum insured. This was Civil Suit No 22–211–90 in the High Court, Ipoh. The respondent took out another suit against the other insurance company claiming the other half of the insured sum. This action was filed in the High Court, Kuala Lumpur. It is also to be noted that the appeal in respect of the decision by the High Court, Kuala Lumpur was also fixed for hearing before us. In respect of the Ipoh civil suit, the respondent commenced the action on 9 November 1990. On 5 November 1992 the respondent was wound up.

The appellant, on knowing that the respondent was wound-up then made an application vide encl 39 in the Ipoh High Court for security for costs. This application was heard by the deputy registrar. The respondent resisted the application, but the deputy registrar made the order that the respondent was to deposit the sum of RM70,000 as security for costs. Being dissatisfied with that decision, both the appellant and the respondent appealed and cross appealed to the judge. It was at this stage, that for the first time counsel for the respondent raised the issue of the mandatory provisions of s 226(3) of the Act, whereby leave of the winding up court is necessary before any action could be commenced against the respondent since it had been wound up. The respondent's counsel submitted that s 226(3) of the Act is an absolute bar to the commencement of any proceeding against a company in the liquidation unless leave of the court had been obtained. That being the case the proceeding before the deputy registrar was a nullity. The learned judge of the Ipoh High Court decided that leave was required before any proceeding could be instituted against the respondent. In the present appeal, no leave was given to the appellant to proceed with encl 39, the whole proceeding before the deputy registrar was a nullity and the order made by the deputy registrar in respect of security for costs should be set aside.

As a result of that decision the learned judge of the Ipoh High Court proceeded to hear the Ipoh civil suit filed by the respondent (Civil Suit No 22–211–90). At the end of the trial the learned judge on 12 May 2000 gave his decision which favoured the respondent. The respondent was given judgment for the sum it had claimed. Against that decision the appellant appealed to this court. The notice of appeal was filed on 19 May 2000 and

it is common ground that the appellant did not obtain any leave from the court to proceed with the appeal as required by s 226(3) of the Act. As a result of that the respondent made the present application. It is obvious to us and to both parties that if the respondent succeeded in this application then Appeal No A–02–338–2000 would lapse because it would be deemed that the appeal is not before us. The grounds for moving the motion are found in the affidavit of Sim Eng Pow dated 13 September 2000.

It was stated in that affidavit that the respondent was incorporated in Malaysia on 25 July 1985. On 1 June 1992, Pernas Trading Sdn Bhd petitioned the High Court at Kuala Lumpur to wind up the respondent company. Pernas Trading Sdn Bhd had earlier obtained a judgment against the respondent and as on 20 April 1992 the amount due and owing by the respondent to Pernas Trading Sdn Bhd was RM1,909,440.98. By an order dated 5 October 1992, the respondent was wound up and the official receiver was appointed as the provisional liquidator. By an order of the court dated 7 September 1993, the Official Receiver, Malaysia, was removed and Mr Lim Tian Huat of Messrs. Arthur Anderson & Co was appointed as the new liquidator.

The grounds for this application are found in paras 18–26 of the affidavit of Mr Sim Eng Pow dated 13 September 2000:

> 18 As stated above, a winding up order was made on 5 October 1992 by the High Court of Malaya at Kuala Lumpur winding up the respondent company. I am advised by my solicitors and verily believe that on that order being made, the relevant provisions of the Companies Act 1965 became applicable to the company. Of the various statutory consequences, the one that renders the appellant's appeal herein liable to be struck off is the requirement of leave contained in s 226(3) of the Act which says that when a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by the leave of the court.
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> 19 I am advised by my solicitors and verily believe that the appeal herein filed by the appellant is without leave of the winding up court as required under s 226(3) of the Companies Act 1965.
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> 20 I am advised by my solicitors and verily believe that the appellant's appeal herein is a proceeding within the meaning of the word occurring in s 226(3) of the Companies Act. Taking leave of the winding up court to lodge an appeal against the respondent company is a statutory requirement, which has to be strictly complied with by the appellant. The appellant has to first apply to the winding up court for leave to present this appeal herein, and only on leave having been obtained, the appeal could then be presented. Leave of the winding up court is *sine-quo-non* for presenting the appeal against the respondent company. The mandate of s 226(3) of the Companies Act has been ignored, and brushed aside by the appellant. As the threshold requirement of leave has been breached, the appeal herein against the respondent company is a nullity and should be struck off.
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> 21 I am advised by my solicitors and verily believe that an appeal lodged in utter disregard of the mandate of s 226(3) of the Companies Act is to be

thrown out at threshold, receives support from s 67(1) of the Courts of Judicature Act 1964 which says that the jurisdiction of the Court of Appeal is subject, nevertheless, to any other written law regulating the terms and conditions upon which such appeals shall be brought. The words 'any other written law' in s 67(1) of the Courts of Judicature Act includes s 226(3) of the Companies Act. The jurisdiction of the appellate court is regulated by the requirement of s 226(3) of the Companies Act and that this is evident by the words 'subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeal shall be brought'. As the appeal herein has not been brought by taking leave of the court, this honourable court may be pleased to make an order striking off the appeal.

22 I am advised by my solicitors and verily believe that the object of the requirement of leave under s 226(3) of the Companies Act is that the Act vests the overall control of winding-up in the winding up court and the liquidator functions under the supervision of the winding up court. This is to ensure, inter-alia, that the just creditors of the company are paid in accordance with priorities stated by the Companies Act. The intention of the statute would be defeated and frustrated if leave under s 226(3) of the Companies Act is not insisted upon as a condition precedent for lodging the appeal herein.

23 I am advised by my solicitors and verily believe that the provisions of s 226 of the Companies Act are in pari materia with s 446 of the Companies Act 1956 (India). Subsection (4) of s 446 reads '(4) nothing in sub-s (3) shall apply to any proceeding pending in appeal before the Supreme Court or High Court'. The Indian Act clarifies that to commence a proceeding or an action in a superior court, leave of the winding up court is indeed necessary. It is the winding up court and that court alone that can grant leave to commence an action or proceeding and a party cannot be heard to say that as he is invoking the jurisdiction of a superior court, leave of winding up court, which in certain cases may be a subordinate court, is not required. The hierarchy of courts is not a relevant consideration. In so far as winding up proceedings are concerned, it is the court that made the winding up order which can grant leave and no other.

24 I am advised by my solicitors and verily believe that the resulting position is that without leave of the winding up court, the appeal herein against the respondent company is a nullity.

25 I am advised by my solicitors and verily believe that the commencement of a proceeding, which included the filing of an appeal against a company represented by a liquidator who is an officer of the court is contempt of court.

26 I am advised by my solicitors and verily believe that any judgment given in a proceeding which is not permitted by the winding up court granting leave under s 226(3) of the Companies Act is void. Hence, the appeal filed herein by the appellant is plainly opposed to s 226(3) of the Companies Act and does not deserve consideration of merits.

During the submission of the learned counsel for the respondent those grounds were stressed again.

After hearing the arguments of both parties we were in complete agreement with the learned counsel for the respondent. Section 226(3) of the Act provides:

> When a winding up order has been made or provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except —
> (a) by leave of the court; and
> (b) in accordance with such terms as the court imposes.

It is not disputed that the appellant did not seek or get leave under s 226(3) of the Act to file the notice of appeal and also to proceed with the appeal. The appellant took the view that there was no necessity to do so because it was an appeal against the decision of the learned judge of the High Court. As such, it was a continuation of an earlier proceeding where the appellant was defending itself.

Section 67(1) of the CJA provides:

> 67 Jurisdiction to hear and determine civil appeals
> (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercises of its original or of its appellant jurisdiction, *subject nevertheless to this any other written law regulating the terms and conditions upon which such appeals shall be brought*. (Emphasis added.)

We agree with counsel for the respondent that all civil appeals could be proceeded upon subject to any restrictions imposed by the CJA or any other written law. In the present application it is clear to us that certain restrictions have been imposed by the law on any party commencing or proceeding to take up any action against a company which has been wound up. One of them is s 226(3) of the Act. The words used in s 226(3) are 'action' and 'proceeding'. Section 3 of the CJA defines those words as follows:

> 'action' means a civil proceeding commenced by writ or in such other manner as prescribed by rules of court but does not include a criminal proceeding;
> 'proceeding' means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding.

It is clear to us that the CJA defines an appeal as a 'proceeding' within the meaning of s 67 of the CJA. That being the case, any appeal to be proceeded upon is subject to the restrictions imposed. One of them is the restriction imposed by s 226(3) of the Act whereby a party must obtain leave from the winding up court to proceed with an appeal against a company which has been wound up which include the commencement of the appeal that is the filing of the notice of appeal. This is a pre-requisite known as the threshold. In *Re Perdana Merchant Bankers Bhd* [1997] 3 MLJ 435, Abdul Malik Ishak J at pp 455–456 said:

> *Re Waterloo Life Insurance Co (No 2)* (1862) 31 Beav 586 at p 589 established a vintage principle to the effect that after a winding-up order had been made,

A further proceedings were absolutely stopped until leave has been obtained from the court. The object of s 446(1)of the Indian Companies Act 1956, which is equivalent to our s 226(3) (a) of the Act, has been described by A Ramaiya in the book entitled *Guide to the Companies Act* at p 2449 in these words:

> The object of winding up a company by the court is to facilitate the protection and realization of its assets with a view to ensure an equitable distribution thereof among those entitled and to prevent the administration from being embarrassed by a general scramble among creditors and others. Consequently, once the court has taken the assets of a company under its control or has passed an order for it being wound up, it will not be proper to allow proceedings to be started or continued against the company and embarrass the administration of its affairs. The present action is intended to safeguard the assets of a company in winding up against wasteful or expensive litigation in regard to matters capable of being determined expeditiously and cheaply by the winding up court itself.
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> The case of *Deutsche Bank v SP Kala* (1990) 67 Com Case 474 at p 477 (Bom) which was affirmed by the case of sub-nom *Deutsche Bank v SP Kala* (1992) 74 Com Cases 577 (Bom-DB) laid down the principle that once a winding-up order was made, no proceeding can continue or be freshly commenced except by the leave of the court.

Further down at p 458 he said:

> In *Seymour & Anor v Southern Districts Video Pty Ltd (In liquidation)* (1985) 3 ACLC 420, the Australian High Court had to construe sub-s 401(2) of the Companies (Western Australia) Code ('the Code') which was worded in this way:
>
> > After the commencement of the winding up, no action or other civil proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court imposes.

Toohey J delivered the judgment of the court and his Lordship had this to say (at p 423):

> Subsection 401(2) of the Code is a law relating to procedure and, except as otherwise provided by the laws of the Commonwealth, it is binding on courts exercising federal jurisdiction. The subsection is expressed in general terms, so far as the prohibition is concerned, in that it strikes at all actions and other civil proceedings. It may seem curious that the leave of the Supreme Court is required to commence proceedings in the Federal Court or to continue such proceedings. But that is the result of federal legislation, not of State legislation.

The case falls squarely within the situation in the present application. In *Rawat Raj Kumar Singh & Ors v Benares Bank Ltd, Benares (in liquidation) & Ors* 1941 AIR All 154, where it was held that where a decree in favour of a company had been passed and the judgment debtor had appealed from the decree and went on with his appeal at the date of the winding up of the company, he should be regarded as proceeding with legal proceedings against the company and he could not do so without leave of the court. At pp 155–156 Braund J said:

> … The proceeding on foot at the date of the winding up order was the appeal by the company and it was open to the company to go on with that appeal without the leave of the court. With that introduction it is possible to see what it was that Lord Davey in his speech actually said. He said this:
>
> > … 'The respondents, that is to say the company, 'now' object that the present appellants cannot proceed with their appeal without the leave of the court in Ireland. I am of opinion that the objection cannot be maintained. It was the respondents who themselves proceeded with the action after the winding up order, by prosecuting their appeal in the Court of Appeal, and *when once an action by the company itself has been proceeded with*, there is necessity for the defendants in the action to obtain leave for any defensive proceeding on their part …'
>
> The italics are, of course, my own, but in my view, the words they cover afford the clue to what it was that the House of Lords really said in this case. His Lordship, as it seems to me, said no more than that when you find at the date of the appeal which was pending at the date of the winding up order there is a proceeding already on foot, which proceeding requires no leave of the court to prosecute it, then that proceeding may go on to its logical conclusion without leave of the court. In other words, he said that, inasmuch as the winding up order in that case was an appeal by the company itself and, as such, was one which needed no leave to prosecute it, it was a proceeding which might go on to its ultimate conclusion-including an appeal to the House of Lords – notwithstanding s 87 Companies Act of 1862, which was the Act then in force. Now reverting to the Full Bench case of the Punjab Chief Court it appears to me with great respect that the learned Judges have overlooked that the decision in (1901) 85 LT 141 was limited in the way I have pointed out. It is not, I think, an authority which decides, in general terms, that wherever you find an appeal from a suit in which the company itself was the plaintiffs, that appeal may be either proceeded with or commenced without the leave of the court …

This court in *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204, held that an applicant should have first obtained the authority from the winding-up judge before proceeding against the liquidator. At p 206, Abu Mansor JCA (as he then was) said:

> When the learned judge was at the point of examining issue No 2 he held:
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> > When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except —
> > (a) by leave of the court; and
> > (b) in accordance with such terms as the court imposes.
>
> As s 226(3) has not been complied with by the applicant, this originating motion, in my view, is not properly before the court and should therefore be struck out.
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> In the circumstances this originating motion is dismissed with costs.

If the reason for the dismissal of the applicant's application, as found by the learned judge under s 226(3) of the Act is valid, then that is the end of this matter.

Further down at p 210 he said:

> We respectfully agree with the learned judge below that the applicant's application should be so dismissed but for a different reason than that given by the learned judge. We think that s 226(3) of the Act only applies where the action is against the company …

In view of what we have stated above, it is clear to us that to proceed with the appeal, leave of winding up court under s 226(3) of the Act is required. This requirement must be complied with. In *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54, it was held that the appellant was out of time, and neither sought an extension of time nor accounted for the delay to the satisfaction of the learned judge, and therefore leave should not have been granted to the appellant to apply for certiorari and the learned judge had no jurisdiction to do so. Abdoolcader FJ at p 55 said:

> … As the decision of the Minister sought to be impugned is dated 23 November 1981, the period of six weeks would, on a computation under O 3 r 2(2) of the Rules of the High Court, expire on 5 January 1982, and as the application for leave was made on 9 January 1982 the appellant was clearly out of time and no extension of time was sought nor the delay accounted for to the satisfaction of the learned Judge who heard the application as required by the rule. Apparently this point completely escaped all parties involved, as a result perhaps of an affliction of incorrigible somnolence that seems to pervade the perception of the law and practice of the profession from time to time. We took the point ourselves as it clearly goes to the jurisdiction of the court from which leave to apply for certiorari was sought as O 53 r (1) stipulates that no application for an order of certiorari shall be made unless leave therefor has been granted and r 1A which we have already adverted to enacts that leave shall not be granted except in accordance with its specific provisions.
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> Lord Hodson said in his judgment in *Secretary of State for Defence v Warn* (at p 402): 'Procedural sections are usually mandatory and there is nothing which points to the contrary in this case'…

The Federal Court in a more recent decision in *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549, held that it is an elementary proposition that the Federal Court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies.

For the reasons we have stated above, we allowed the application by the respondent as in the notice of motion with costs. The notice of appeal dated 19 May 2000 is hereby struck off.

As a result of the striking out of the notice of appeal, we have made several consequential orders. Appeal No A–02–338–2000 was dismissed with costs because that appeal was not properly before the court. Appeal No A-02-848-98 was also dismissed with costs. In appeal No W–02–29–2000 the learned counsel for the appellant conceded that in view of the court's decision in the notis usul, the appeal should be dismissed. Appeal No W–

02–115–20000 was allowed with costs here and the court below. The order of the learned judge was set aside.

Those deposits paid by the appellant are to be paid to the respondent to account of taxed costs. The deposits paid by the respondent to be refunded to the respondent.

Application allowed.

Reported by Jafisah Jaafar